No. 3073

In The

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES P. DOE, CLAIMANT OF THE STEAMSHIP "GEORGE W. ELDER," HER ENGINES, ETC.,

Appellant,

vs.

COLUMBIA CONTRACT COMPANY, A CORPORATION, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, STIPULATORS,

Appellees.

Reply Brief of Appellant

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Replying to that part of the argument in appellee's brief touching upon the assignment of errors, it is pointed out that all assignments of error that could be made are made. The assignments of error cover the action of the court below on all points upon which the court ruled. The appellee being the prevailing party in the court below could have presented findings of fact or asked for rulings on particular points, which, however, was not done. The court merely made its finding of negligence and gave a decree.

The appellee further contends that the decree should be affirmed because of the well settled and universal rule that in admiralty causes the decree of the lower court will not be reversed unless manifestly contrary to the evidence. The appellant points out that there still remain the various questions of law and of application of the rules raised in the court below and brought here on appeal, and in addition, there is no finding of fact made by the court below that the appellant has sought to upset. The appellant merely says that in addition to the findings of the court below are facts which the court might have found and did not. It will appear from the briefs that there really is little, if any, question of fact between the parties.

Paragraph 3 of the appellee's brief begins and ends with the proposition that the Elder was an overtaking vessel.

This is the theory upon which the suit was brought. The following is taken from the libel at page 9 of the Apostles, to-wit:

> "The libelant avers that said collision was occasioned solely through negligence and carelessness of those in charge of the navigation of the George W. Elder in that she did not keep out of the way of the Daniel Kern and attempted to pass the Daniel Kern from astern without receiving the assent of the Daniel Kern indicated by the appropriate whistle so to do and attempted to pass when the Daniel Kern had blown four short and rapid blasts of her steam whistle indicating that it was not

safe for the George W. Elder to attempt to pass at that point."

The libelant and appellee then proceeds in support of this contention to undertake to apply Art. 24 of Rule 9, and not only maintains that this article should be applied to the facts in all its strictness but being applied, puts the Elder at fault. The court below held this to be a close question. The appellant undertakes to show that the application of this rule under which the Elder was put at fault by the court below, is erroneous. To bring the court to the conclusion that the facts in this cause create the condition of an overtaking and an overtaken vessel with regard to the Elder and the Kern, the appellee has cited many cases. In these cases, however, it will be seen that the vessels actually were within that category, to-wit: they were on the same course and proceeding on a steady course. But in doing this, and in citing these cases of admittedly overtaking and overtaken vessels, the appellee avoids the question involved in this suit raised in the lower court and raised by the appeal, which is: Are the facts such as to call for the application of the rule? The rule exists, but is it to be applied herein?

On page 7 of the appellee's brief it is stated in a footnote that the appellant has by admissions in his answer and admissions in the lower court, put his contentions beyond the consideration of the court. This footnote indicates an admission by

the claimant and appellant in the latter's answer. To show the inaccuracy of the appellee in this matter, the court's attention is directed to said answer on pages 13, 15 and 16 of the Apostles. In the argument, it was thought it might be necessary to ask for an amendment on this point because the appellee's brief had not been received by the undersigned until the day previous to the hearing, but a further investigation of the record shows that there is no basis for the appellee's suggestion. In the first place, there is no admission of law or of any fact which precludes the appellant from raising the questions on appeal. In the second place, the claimant and appellant specifically pleads, on page 13, that the Kern had a head line at the time, running from the "Kern" to the port barge of her tow, "and this claimant avers that the said Kern was then and there made fast to said port barge, and this claimant is informed and believes, and he therefore alleges the fact to be, that the said Kern was then and there made fast to the starboard barge and that her bow was against the middle barge of the tow and between the port and starboard barges of said tow. This claimant denies that the said Daniel Kern was headed down the Columbia River, and denies that the said barges were or that any of them was headed substantially or at all at right angles to her port bow or towards the Oregon shore of the Columbia River. On the contrary, this claimant avers that the said Kern and all of the said barges

were headed towards the Washington shore of the Columbia River and obliquely across the channel of said Columbia River."

This allegation does away with the unfounded charge that the claimant has admitted itself out of court, and in fact, the evidence supports the facts alleged, and the libelant now admits, as shown by the record, that the barges were headed towards the Washington shore and obliquely or otherwise across the channel of the Columbia River, and the Kern's nose was against the stern of the barges, more or less up and down stream.

Also, on page 7 of appellee's brief is a statement that the appellant's proctors conceded in the lower court that the Elder was an overtaking vessel. The undersigned did not take part in the trial, but if there is such a statement in the record the undersigned has failed to see it. It is true that the law of overtaking vessels was discussed pro and con and it is true the proctor for the claimant in the court below argued the rule applying to overtaking vessels to show that even if the Kern were an overtaken vessel, nevertheless it was to blame. To say, however, that the claimant and appellant has admitted a principle of law or the application of a rule to its detriment is going much further than the undersigned has found the record justifies.

It would seem that the contention of the appellee that the Kern was an "overtaken" vessel is made impossible by its own argument that the

Kern threw herself crosswise of the stream before the collision occurred. The Kern's testimony all is that the pilot on the Kern rang for full speed ahead and in so doing by reason of his position against the barges and the fact that the wheel was lashed, the Kern became crosswise in the channel. To claim, then, that the rule of an overtaken and an overtaking vessel applies would dispose of the contention of the appellee that the act of the pilot in sending the Kern full speed ahead, with her wheel lashed, was done *"in extremis."* It is submitted that the Kern cannot claim to be both within and without the rule. If it claims that the rule of an overtaking vessel applies, it must admit that it was crosswise of the channel, that it became crosswise of the channel by the act of the pilot and after it had signalled to the Elder. Under the authorities, however, the appellant cannot believe that the court below was correct in holding the Elder to be an overtaking vessel.

If the rule covering an overtaken vessel applies, then this act cannot be held to be *in extremis* and the Kern should be held to have impeded and baffled the Elder.

In each of the cases cited as an authority on the question of an overtaking and an overtaken vessel, the courts say either that the ships were "running in the same direction, the one astern of the other" or "the duty of the overtaking vessel is to keep out of the way of the one leading her" or *"while the overtaken vessel keeps her course."* In each and

every one of the cases cited the vessels were on a steady course and on the same course and were in fact, an overtaken and an overtaking vessel. In this suit, however, such are not the facts.

The appellee contends that the burden of proof rests upon the Elder of proving (a) that she was free from fault, (b) that the Kern was guilty of negligence contributing to the collision. This claim of throwing the burden of proof on the Elder is due to the erroneous contention of the appellee that the Elder was the overtaking vessel, because if she were not the overtaking vessel no law could be found under which the burden would be thrown upon the Elder. The authorities cited by the appellee in support of the contention that the burden of proof is on the Elder are all cases of an overtaking and an overtaken vessel. The holding that the burden rests upon the overtaking vessel is clearly reasonable, for when one vessel is pursuing another on a steady course and overtaking the other, in the nature of things it is manifestly the business of the overtaking vessel, being faster, not to run down the overtaken vessel, and on the other hand it is the law that the overtaken vessel shall not "baffle the overtaking vessel or crowd her off her course or interfere with her," this being both in the rules and in the decisions.

The Governor, Fed. Cs. 5645.

The Rhode Island, Fed. Cs. 11745.

But where the rule governing overtaking vessels cannot be applied because the facts do not justify it, then as a matter of course a portion of the rule cannot be applied and the burden of proof shifted.

It was the view of the court below that the rule governing overtaking vessels should be applied in this cause and it was this that caused the court below to throw the burden on the Elder and at the most that the libelant can claim, the showing is that the Kern stopped the Elder without reasonable explanation.

> "If the general conditions of navigation and the relative speed of the vessels are such that a steamer astern can safely pass the other, she is at liberty to do so; and she cannot be deprived of her privilege by the neglect or contumely of the steamer ahead."
>
> *The North Star,* 151 Fed. 172.

The court below found that the Elder signalled from a half a mile to five-eighths of a mile from the Kern and the court below refers repeatedly to the fact that the Elder curved to port on reversing.

It was the contumely of the Kern that deprived the Elder of her privilege of passing and it being a dark night the Elder could do nothing but reverse. In the daylight she would undoubtedly have kept her course and passed.

The appellee proceeds so far as to criticize the appellant's policy of trying the cause. The appel-

lee finds fault with the appellant because the appellant has not proved certain facts set forth in his answer, and the appellee yields to a tendency to infer a conversation between Capt. Patterson and the appellant's proctors in the court below.

Not to overlook this matter, the court is reminded that Capt. Patterson was not and is not in the employ of the Elder or the claimant. Under the Oregon compulsory pilotage law Capt. Patterson went on the Elder and took charge of her. It is bad enough that the collision occurred, but it is the height of injustice in the law to consider the acts of Capt. Patterson after the collision as in any way binding or affecting the claimant. Capt. Patterson, being an Oregon state pilot, made such statements and took such steps as he might have seen fit. If he told the appellant's proctors in the court below that the search light of the Kern was flashing in his eyes, it was no crime on the part of said proctors to plead these facts. If Capt. Patterson caused facts to be pleaded that misled the claimant in any respect, this should be charged against the State of Oregon and not against claimant.

Nor does the fact that the appellant filed more than one defense in the law throw the burden of proof against the claimant. Nor does Capt. Patterson's testimony on the witness stand bind the claimant as an admission, nor does the fact that he failed to testify in support of certain points affect the claimant.

The real facts are what the law seeks. The facts in this cause are known. What are not established by the decree of the court below are established beyond question by the evidence. The Kern's wheel was lashed, she was pointing downstream, the barges were across her bow, she had been backing and filling, the pilot gave orders for full speed ahead, and threw her crosswise of the channel with her wheel still lashed, she was not an overtaken vessel, she stopped the Elder when she had no right to and created a condition that brought about a peculiar accident, inasmuch as the curving course of the Elder reversing happened to bring her into collision with the Kern, and the Elder, even then, might have missed the Kern if the Kern had remained stationary. As a matter of fact the Elder could not possibly have overtaken the Kern, could not have reached the Kern, and could not have touched the Kern, if the Kern had been on a course down the river. If the Kern had been an overtaken vessel she could not have been touched by the Elder.

As to the matter of the searchlight and the testimony of Capt. Patterson before the inspectors and the answer of the appellant to that effect: Is it the law that because this answer was not proved that the Elder is guilty? If the Oregon pilot reported a condition of facts on which an answer was based and which he did not substantiate at the trial does this change the facts or alter the conditions? Does this entitle the appellee to expect the court to relieve it from the overt act of Capt.

Moran in not knowing the rules, in sounding the danger signal when he "baffled" the Elder and in throwing his vessel crosswise in the current with his wheel lashed? Does this entitle the libelant to claim that the Kern was an overtaken vessel?

It seems to the appellant that all that part of the appellee's brief on the subject of the searchlight is calculated to lead the discussion away from the material facts.

The real and lawyerlike disposition of the fact that the appellant pleaded an answer which was not substantiated with regard to the searchlight is that there was no evidence on the subject and it was not sustained, but the fact that it was pleaded and not proven does not penalize the appellant and claimant. Moreover the assumption of the appellee as to conditions regarding the searchlight can easily be refuted. The claim that the searchlight, when the Kern was raised, was found pointing just over the port bow is of not much importance. Divers were on the Kern. Beside, interested and intelligent witnesses were there that photographed the searchlight after she was raised. In fact, what is a searchlight for if it is not for use on a dark, clear night?

It has been shown from the beginning of this cause and so found by the court that there was no lookout on the Kern and the argument in the appellee's brief that there might have been a lookout, the appellant trusts will receive the consideration it deserves.

The testimony is that all of the crew of the Kern were forward making fast to barges. Moran's testimony is not that he was on the bridge of the Kern. The pilot Moran was in the pilothouse of the Kern and he was looking forward. There was an unobstructed view of the Elder, which is the reason the appellant says that there was negligence on the part of the Kern. With an unobstructed view, without a lookout, with all of the crew occupied in removing an obstruction of danger to passing vessels that their employers had placed in the river, they either saw or did not see the Elder. If they saw her, they had no excuse for sounding the danger signal. She was half a mile away. If they did not see her, they are to blame.

The matter of a lookout is discussed in the case of

William A. Jamison, 241 Fed. 950-952.

This is a case of a tug making fast to a tow. The court says:

> "The fault of the Jamison, if any, is in the absence of a lookout. Both deckhands were at the stern of the tug taking in the lines and the master in the pilot house was both navigating and keeping a lookout. *This is a divided duty, which the law will not accept as a performance."*

This case seems to be on all fours with the present suit. The deck hands were all busy. Capt. Moran says he was in the pilot house, not navigating at all, but making fast to the tows, which is

something the law should not tolerate and the above court holds that it does not tolerate.

This case also holds that a vessel not navigating upon any course cannot apply the steering and sailing rules. (Pg. 951.)

The appellee in the opinion of the appellant, has yielded its entire right to any claim for negligence against the appellant on page 21 of its brief, where it says, "HAD THE 'KERN' BEEN MOVING AT THE TIME HER SOLE DUTY WOULD HAVE BEEN TO KEEP HER COURSE AND SPEED."

She was not moving. Her wheel was lashed. She was adrift. She was trying to pick up a dangerous menace in the ship channel.

There is no such condition as being "constructively" under way.

The appellant has claimed from the outset that the Kern was "privileged." As indicated in our opening brief, the Columbia Contract Company has tried to establish the proposition that it has the privileges of the river and in the appellee's brief this point is brought out for argument by the appellee itself. The appellee claims to have occupied a privileged position on the river. If the court wishes to hold that this is the law it will be yielded to by the pilots and the captains of the river boats. It will, however, bring about many accidents in addition to those already created and caused by the rock barges in the river.

The position and contention of the appellee is

clearly shown by the following statement on page 21 of its brief:

> "Being constructively under way, within the intent of the rules (Preliminary Statement 2, Inland Rules), the analogous obligation, of continuing to do that which she was doing when the overtaking vessel approached, rested upon her, just as the duty of maintaining her course and speed rests upon the moving and overtaken vessel. The latter requirement is imposed upon all privileged vessels (Art. 21), and has its purpose in the necessity of requiring some uniform standard of conduct on the part of the privileged vessel, in order that the burdened one may safely determine the conduct necessary on her part to carry out her duty of keeping clear."

The appellee goes so far as to argue that a boat may be "constructively" one thing or another—that it could be "constructively" backing when as a matter of fact it is going forward, that it could be "constructively" on a steady course when its wheel is lashed and it is adrift, and that it could "constructively" have a lookout when it has none, that its pilot could be "constructively" beyond criticism although not cognizant of the regulations.

On page 22 of appellee's brief this claim that a ship may be "constructively" one thing when it is another, is elucidated and the contention of the appellee that the overtaking rule cannot apply in this cause seems to be made clear. The appellee here says where a vessel dead in the water "though

constructively under way because she is not drifting (which the Kern was) or made fast to the shore or ground, she is constructively going in one direction on a steady course." The appellee further claims "that in a contemplation of the law the Kern did all she was required in holding, *figuratively speaking,* her course and speed. Having thus fulfilled her obligation as the *privileged* vessel to the Elder as the burdened vessel, she is not liable, even though one of her crew was not active in the sole capacity of lookout." Such a contention as this is one demanding attention, if for no other reason than to learn whether the law is going to hold that a ship may be "figuratively speaking" a privileged vessel, or "figuratively speaking" holding her course and speed when as a matter of fact her wheel is lashed, she is adrift with no lookout and her tow crosswise of the ship channel.

In short, the appellee maintains that the Kern was not to blame *"figuratively speaking"* and as a matter of fact and *not* "figuratively speaking" that the Elder is to blame, and the appellant submits that the admissions of the Kern on this appeal make clear the actual condition of the Kern's attitude.

Nor is this appellant to be led to one side to any contention or argument as to the leaving of the barges in the ship's channel. The appellant knows it is a continuous menace and the appellant knows that there is no law which prevents it or which can prevent it, because it becomes necessary for boats

in doing business on the water to make exchanges. Nevertheless, it seems to the appellant that where there is such a width of water as there is at this point, it was a case of gross neglect on the part of the libelant to leave the barges in the ship's channel. Why were not the loaded barges left out of the channel? No excuse is given for not so doing.

The appellee further and continuously applies law as to the matter of an overtaking vessel and an overtaken vessel and cites American and English Encyclopedia of Law, to which the appellant replies, as heretofore, that to create this condition the ships must fulfill the conditions described in Rule VIII, Art. 18, page 29, of the appellee's brief:

> "When steam vessels are running in the same direction and on a steady course"

as explained by the cases heretofore cited.

At this point a note appears on page 32 of the appellee's brief to the effect that the pilot house of the Kern prevented a view astern.

The undersigned has no hesitation in saying there ought to be a strip of glass through which the man at the wheel on the Kern can easily see astern. It is beyond the probabilities that the pilot house of the Kern was so enclosed as to prevent an outlook and if this is so and as stated by the appellee, the appellant should have claimed that it is gross negligence on the part of the Kern to have such a pilot house. If the man in the pilot house cannot see aft, then a lookout was a necessity. The pho-

tograph does not show, to the recollection of the undersigned, that the man at the wheel on the Kern cannot see astern. The Kern has no bridge. There are rooms immediately aft of the pilot house, but there appears in the photograph to be a raised portion where the usual strip of glass allows the man at the wheel to have a view aft. Moreover as to this portion of the appellee's contention if the Elder were a half a mile away, and this is the law of the case because the court below so found, all her lights would have been visible if she were exactly as Capt. Patterson testified, going to the starboard of the Kern, and she must have pointed to the starboard of the Kern because she came on a curving course when Patterson reversed.

The fears and doubts of Capt. Moran of the Kern made much of in the testimony and the briefs are not understood by the appellant to furnish any defense to the Kern or any excuse for its actions. If the owner of the Kern employed a captain who is subject to unusual fears, such as to prevent the passage of a passenger ship on its regular course without any excuse, is this, although put forward by the appellee as a defense or an excuse, available for that purpose? It seems to the appellant that the appellee is admitting its own wrong by making prominent the apprehension of Capt. Moran. If there had been a ground for Capt. Moran's apprehension, then his apprehension would be based on something, but apprehension without a reason offers no excuse in law nor under the rules and regu-

lations affecting the handling of ships. To offer nothing but Capt. Moran's apprehension of danger as an excuse for his action seems to be a pure confession of negligence on the part of the Kern. In other words, the blowing of a danger signal under any and all circumstances does not absolve the ship that blew the danger signal. The very fact that the danger signal was blown in this case caused the accident. If the danger signal had not been sounded there could not have been an accident. The excuse of the Kern is that Capt. Moran was apprehensive. The law requires the ground for the apprehension to be shown. Mere apprehension is not sufficient. It is in fact, hearsay. The court is entitled to decide whether the apprehension should have existed or not—the issue is not whether a captain were apprehensive or not or what his state of mind or body might have been, —the question is, were the facts such as to justify certain conditions? And the appellant therefore points to pages 36, 37 and 38 of the appellee's brief making prominent the apprehension of Capt. Moran as an effort which was successful in the court below of inducing the court below to grant the decree that was given whereby the law was misapplied and an error committed. In fact the entire case is again made clear by a statement on page 38 of appellee's brief as follows:

> "For instance, if an overtaking steamer did not, without consent of the overtaken vessel,

> approach within such distance but what she could stop before the vessel being overtaken is reached, the rules would be complied with and occasion for such presumption as we have been discussing would not arise."

This is true. If there had been an overtaken vessel, if the Kern had been an overtaken vessel, if the Kern had been on a steady course as Patterson had to think she was because he could not see her sidelights, he would have stopped, that is, the Elder would have stopped long before the vessel being overtaken, that is, the Kern, would have been reached. If the Kern had been an overtaken vessel, if she had been on a steady course she would not have been reached by the Elder.

An issue was made by the appellee as to the effect of Capt. Moran's ignorance of the regulations and on page 39 of appellee's brief there is an indication that the appellant has nowhere suggested that the misunderstanding of Moran was contributory to the collision. It has seemed to the appellant that Moran's failure to understand the rule and his explanation of his conduct in connection herewith carried its own argument, to such an extent that further explanation was not necessary. However, to go into this matter:—it is shown by the appellee that Moran saw the Elder coming. She was a half a mile away. Both her lights must have been visible, although she was pointing slightly to the starboard of the Kern. She was to pass to starboard. She signalled to pass to starboard

and she had a half mile to do it in. Moran heard the starboard passing signal. He saw the Elder. He says he saw she did not change her course. This, however, is an incident worthy of note because she was half a mile away and he could not tell nor could any other man tell to the exact inch and foot how she was pointing, as Moran claims he could tell. Nevertheless, Moran saw that the Elder was coming in his direction and instead of answering, as he should have answered, he thought and believed that the Elder was compelled to change her course on giving the passing signal, and before he answered. It is not in the nature of an abstract proposition. It was this fact, this misunderstanding on the part of Moran that caused him to sound the danger signal. If he had known the rule he would have sounded the passing signal in answer to the Elder's passing signal. In that event there would have been no accident. Moran thought that it was his business, he says, and his duty to watch the Elder change her course before he answered, whereas it was his duty to answer first and have the Elder change her course after he answered. It seems clear from a reading of the record and an understanding of the conditions that exist and the facts as testified to that if Moran had sounded the passing signal in answer to the Elder's passing signal there would have been no collision.

The appellee then again attempts to point out that under Article 24 the Elder is an overtaking

vessel. As stated hereinbefore, it must first be found that the Elder is an overtaking vessel before rule 24 can be applied.

The position of the appellee is that the Kern cannot be held at fault "for she can only be held in fault for a contributory act." Does not this apply to the Elder and not the Kern? It was the Kern that stopped the Elder. What contributory act did the Elder do that brought about this collision? The Elder tried to pass as usual in the ship's channel. It was dark, the ship channel was blocked and as far as Capt. Patterson was concerned on the Elder, the danger signal from the Kern must have indicated that the barges were adrift, for otherwise no excuse can be given by Capt. Moran for sounding the danger signal. The Elder reversed. It reversed as soon as possible. It sounded its first signal at the proper distance. It could do nothing more or less than try to stop headway. The conditions that brought about the collision were begun by the Kern and finished by the Kern. What contributory act did the Elder do? As far as the appellant can see the Elder did nothing that contributed to the accident.

Now let us see, in answer to the appellee's assertion, what was the contributory act of the Kern?

In the first place the Kern voluntarily chose the ship channel in which to maneuver the barges. Being in that position, its wheel lashed, adrift, with one line fast to the barges, it arbitrarily stopped the Elder on her regular course when she

had room to pass and certainly would have passed if she had not been stopped. Not satisfied with this, Capt. Moran puts the Kern full speed ahead and throws her crosswise in the current. It is even possible that the Elder would have missed the Kern completely if Capt. Moran had not sent the Kern ahead.

It is therefore submitted to the court that the law sought to be applied by the appellee when properly applied puts the Kern in fault and not the Elder.

The appellee's position is set forth again on page 53 of the brief on the general broad proposition that the Elder failed to keep out of the way of the Kern. As the Kern was drifting and fast by one line to three barges of three thousand tons of rock, it is somewhat hard to imagine how the Elder could have *kept out of her way, for she had no way.* She may have been under way in the matter of backing and filling, as some of the crew on the Kern testified, and the charge that the Elder "was in fault in not so checking her speed as to avoid overtaking the Kern until passing signals were properly exchanged" is a clear illustration of the erroneous holding of the court below and of the fallacious argument of the appellee, because the Elder could not overtake the Kern as the Kern was not on a course and there was no passing signal to be given from passing or pursuing to an overtaken or pursued vessel.

An opening is given to the appellant to point out to the court the appellant's contention by the fact that the appellee claims now that the Elder is to blame because she did not sound three whistles under the rules when she reversed.

These are the facts. The Elder reversed and did not sound three whistles. Why the pilot did not do this is explained by himself. However, why he did not is immaterial. The question is, did the fact that he did not sound three whistles have any bearing on the speed of the Elder or on the curve to port that she was necessarily making when she reversed? This cause appears before the court now with the appellee claiming that it can break the rules and have a pilot ignorant of the rules without being blameworthy, whereas the Elder must have been blameworthy in every respect of the case. It is submitted that the sounding of three whistles by the Elder would in no way have changed her course or have impeded her progress and there is no evidence that it would have had the slightest effect upon the Kern or have done anything to have avoided the collision. However, the libel is limited to the question of overtaking and overtaken vessels.

The appellee sets forth on page 60: "The point of it all is that the Elder was so navigated that, when the Kern answered her second passing whistle with the danger signal, she had gotten into such a position—so close to the Kern—she could not be stopped before striking the latter." This is pre-

cisely the case. Nevertheless the Elder is not blameworthy because the Elder was a half a mile away when she first signalled and it can be figured from the evidence that she was over a thousand feet away when she reversed and it was her curve to port on her left hand wheel that threw her into the Kern, all of which was due to the fact that Capt. Moran either wanted to stop the Elder on account of her waves or wash, which would have separated the barges, or else because he did not know the rules and thought the Elder had to change her course before she signalled to pass to starboard. It is a fact that the Elder could not be stopped before striking the Kern, but the question is, did the Kern bring this about or did the Elder bring it about, and the appellant submits to the court that it was brought about by the Kern and not by the Elder.

The appellee further contends that the Elder is in fault because the Elder did not break the rules. This is on page 62.

The position of a man on the bridge of the Elder can easily be imagined. A half a mile away is the Kern. It is natural to suppose that she is fast to the barges and that she will be passed as usual. Nevertheless she answers with a danger signal. This indicates the barges are separated or that the lights are out and that the Elder had better look out for its own safety. There is one thing to do and the Elder reversed as soon as the pilot knew the danger signal was being sounded.

The court below held that the Elder was free to go anyway she wanted. She might have been physically free to have gone anyway she wanted, but no one knowing what these rock barges are would take a chance of hitting one. She had one thing to do, that was to stop and see what was the matter, and in stopping as she was ordered to by Moran, she happened not to miss the Kern by sixteen feet.

The contention that the Elder was going at a high rate of speed when she struck the Kern not only cannot be proved, but cannot be shown by deductions of any kind. If the Elder had been going at any speed she would have cut the Kern in two without feeling it. She probably was barely moving when she reached the Kern. Her progress was probably imperceptible. A boat like the Kern would have offered no resistance to the bow of the Elder if the Elder had had any speed at all.

The appellee's contention is finally set forth on page 66 of its brief. It sets forth four points.

It is pointed out to the court that in not one of these points is a question made of the evidence. It is a question of law. Point (1) includes points (2) and (3). Point (1) excludes any other condition or theory than that the rule of an overtaking and an overtaken vessel shall apply. Point (2) is a generalization under point (1). Point (3) is a greater generalization under point (1) and in fact is the holding of the court below. The foregoing

are all necessarily based on the fact that the Elder did not break the rules as to signals and course.

Point (4), however, is based on the contention that the Elder did not break but should have broken the rules and followed another course.

On the other hand, the appellant contends as follows:

(1) That the burden of proof is on the libelant and appellee as usual, and that nothing has occurred to throw the burden on the appellant.

(2) No facts are proven by the Kern or by the libelant to explain the reason of Capt. Moran's giving the danger signal other than his ignorance of the regulations or his fear of the waves and wash from the Elder disturbing his attempt to make fast to the barges, neither of which is a justification. The Elder was on her course to starboard of the Kern and the barges and the accident would not have occurred excepting for the action of the Kern in stopping the Elder.

(3) The libelant voluntarily blocked the ship's channel when there was spacious room in which to have maneuvered these dangerous barges clear of the fairway.

(4) The Kern had no lookout.

(5) The Kern's wheel was lashed, her navigation was abandoned.

The appellant is seeking a reversal of the decree, awarding to the appellant his costs and disbursements incurred against the libelant.

Portland, Oregon, February 19, 1918.

Respectfully submitted,

SANDERSON REED,
Proctor for Appellant.